

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in May 2013

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Classification; Experience; Complexity and Problem Solving; Freedom of Action; Scope and Effect; Intrasystems Contacts; External Contacts; Direct Supervision Exercised Job Duties; Physical Coordination; Working Conditions and Physical Demands

CASE STYLE: Wolfe v. West Virginia University

DOCKET NO. 2012-0028-WVU (5/3/2013)

PRIMARY ISSUES: Whether Grievant demonstrated that she is not properly classified.

SUMMARY: Grievant argued that she was performing the same duties as a co-worker who was in a classification in a higher pay grade than she, and she also asserted that her duties entitled her to a higher degree level in several point factors.

KEYWORDS: Calculation of Overtime; Holiday Pay; Regular Rate of Pay; Actual Hours; Timeliness

CASE STYLE: Blon, Sr., et al. v. West Virginia University

DOCKET NO. 2011-1492-CONS (5/13/2013)

PRIMARY ISSUES: Whether Respondent's new Guidelines are in violation of any law, rule or regulation.

SUMMARY: Grievants alleged that new Guidelines for the calculation of overtime were in conflict with WVU Policies on overtime, and that hours they worked on holidays should be included in the calculation of overtime, as had been done in the past. Grievants did not demonstrate that such a conflict exists. Grievants are paid at the rate of time-and-one-half for hours actually worked on a holiday, the same rate they are paid for overtime hours worked.

KEYWORDS: Time Limits; Appealing a Grievance; Affirmative Defense

CASE STYLE: Cale v. West Virginia University
DOCKET NO. 2013-0197-WVU (5/23/2013)

PRIMARY ISSUES: Whether Respondent proved that the level three appeal was not filed with in mandatory time period.

SUMMARY: Grievant filed her Level Three appeal at least twenty-three days after receiving the Level Two Mediation Order. Grievant contends that she and her Representative did not receive the Order; however, the Order was mailed to the addresses where the Notice of Mediation was sent, and both Grievant, and her representative, received those notices. Respondent asserts that the Level Three appeal was untimely filed, and, as such, has moved to dismiss this grievance.

KEYWORDS: Application for Promotion; University Guidelines; Annual Faculty Evaluation; Student Evaluation of Instruction Forms; Tenure; Significant Contributions in Teaching, Arbitrary and Capricious

CASE STYLE: Ganikhanov v. West Virginia University
DOCKET NO. 2012-1357-WVU (5/22/2013)

PRIMARY ISSUES: Whether the Provost's conclusion that Grievant had not made significant contributions in teaching was arbitrary and capricious.

SUMMARY: Grievant applied for promotion to Associate Professor and tenure in the Fall of 2011. None of the levels of review supported his promotion, and only the College Evaluation Committee recommended that Grievant be awarded tenure. None of the levels of review found that Grievant had made significant contributions in teaching, and neither the Department Committee nor the Department Chair found that Grievant had made significant contributions in research. The Provost denied the applications for promotion and tenure, based on a finding that Grievant had not made significant contributions in teaching, although the Provost did find that Grievant had made significant contributions in research. Grievant did not demonstrate that his successes in teaching reached the level of significant contributions.

KEYWORDS: New Job Positions; Salary; Arbitrary and Capricious; Relief; Budgetary Decision; Pay Grade

CASE STYLE: Olson, et al. v. Mountwest Community and Technical College
DOCKET NO. 2012-0868-CONS (5/9/2013)

PRIMARY ISSUES: Whether Grievants established by a preponderance of the evidence that Respondent's decision concerning the positions was an abuse of discretion.

SUMMARY: Grievants argue that it is unfair that their salaries are not the same as a co-worker, Benjamin Taylor. The basis for the grievance is that they believe that their work is comparable to that of Mr. Taylor and that they should be compensated similarly. Initially, Mr. Taylor was appointed to the College as a tutor with the same pay, position title, and employment terms as Grievants. Subsequently, Mr. Taylor secured another position at the College as an Assistant Professor, and his salary was higher than the pay of the tutor position. Grievants did not meet their burden of proof and establish, by a preponderance of the evidence that the actions of Respondent were in some way arbitrary and capricious.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Training; Compensation; Daily Rate of Pay; Per Diem
<u>CASE STYLE:</u>	<u>Ramsey, et al. v. Jefferson County Board of Education</u> DOCKET NO. 2013-0377-CONS (5/30/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent's decision to compensate Grievants by way of a per diem stipend, instead of their daily rate of pay was an abuse of discretion.
<u>SUMMARY:</u>	The only issue in this grievance is whether the Grievants should be paid at a previously established per diem stipend or at their daily rate of pay for attendance at mandatory training outside of their contractual work periods. Grievants established by a preponderance of the evidence that Respondent erred in failing to compensate Advanced Placement teachers at their daily rate of pay. The record established that both the West Virginia Department of Education and the West Virginia Legislature agree that the daily rate of pay is the appropriate manner in which to compensate teachers for work outside their regular contractual period. In addition, the Grievance Board has held that required training is considered compensable work time and it is compensated at the regular rate of pay.

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COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Custodial Duties; Maintenance Jobs; Overtime; Mulch Spreading; Next in Line; Seniority ; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Lacy v. Kanawha County Board of Education</u> DOCKET NO. 2013-0847-KanED (5/29/2013)
<u>PRIMARY ISSUES:</u>	Whether spreading mulch on school playgrounds is work reserved for general maintenance personnel
<u>SUMMARY:</u>	<p>Grievant is employed as a substitute service employee holding dual class titles for custodian and general maintenance positions. In or about September through October 2012, his employer needed mulch spread on various school playgrounds. After the regular custodians declined to perform this work on an overtime basis, a supervisor awarded the assignment to two employees on a list of available substitute custodians. During this time, Grievant was only accepting assignments for general maintenance work, and had asked to have his name removed from the substitute custodian list.</p> <p>Prior to September-October 2012, the employer had assigned the vast majority of mulch spreading jobs to employees in a maintenance classification, with some mulch work being done by custodians. Grievant is asserting that this work should have been offered to persons on the list of substitute general maintenance personnel. However, none of the Code provisions relied upon by Grievant deprive his employer of its reasonable discretion to assign work to school service personnel holding multiple classification titles, as was done here.</p>

KEYWORDS: Classification; Grass Mowing; Job Description; Assigned Duties

CASE STYLE: Lockard v. Mingo County Board of Education

DOCKET NO. 2012-0655-MinED (5/10/2013)

PRIMARY ISSUES: Whether Grievant's grass cutting duties are inconsistent with the statutory classification definition of his job title.

SUMMARY: Grievant maintains that care of grounds does not fit with the duties of a general maintenance employee. Grievant contends he should not be required to cut grass and that said activity is the prescribed duties of a designated classification. Grievant contends the amount of grass cutting he performs goes well beyond "incidental" and grass cutting is not a "crossover" duty. Respondent maintains it is within its purview to assign various duties to a maintenance employee which includes cutting grass.

Respondent has consistently construed grass mowing duties as part of general building maintenance. All Maintenance Department employees cut grass, some employees more than others, but all classifications participate in mowing activities of Respondent's properties, from time to time, as other priority duties allow.

<u>KEYWORDS:</u>	Classroom Recordings; Evidence; Inappropriate Conduct; Hostile Learning Environment; Breaching Confidentiality; Standard of Conduct; Wiretap Act; Arbitrary and Capricious.
<u>CASE STYLE:</u>	<u>Francisco v. Putnam County Board of Education</u> DOCKET NO. 2011-0235-PutED (5/1/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent by a preponderance of the evidence properly established employee misconduct.
<u>SUMMARY:</u>	<p>Grievant a kindergarten teacher's aide employed by Respondent, challenges her suspension days and her placement on an improvement plan. Grievant argues that Respondent improperly utilized non-consensual recordings to justify the disciplinary action. Counsel emphatically argues that applicable state and federal code prohibits the utilization of such material from consideration by any political subdivision or any officer thereof. Grievant contends Respondent's disciplinary actions are illegitimate, excessive and not adequately substantiated by admissible evidence. Respondent contends its disciplinary actions are justified.</p> <p>While it is recognized that Respondent played no role in the original alleged illegal interception of the classroom communication, and came in possession of such through their administrative responsibilities of administering the Putnam County School system, the recordings are and were the justifying catalyst for the disciplinary action levied. The recordings are not proper evidence in the facts of this grievance matter. Absent any apparent validation gleaned, discerned or perceived provided by the contested recording, Respondent did not establish by a preponderance of the evidence that Grievant violated applicable employee code of conduct to warrant the severe disciplinary action levied. Grievance granted in part.</p>

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Classification and Compensation; Reallocation; Class Specifications; Position Description Form; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Brown v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel</u> DOCKET NO. 2012-0736-DHHR (5/8/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondents' failure or refusal to approve the posting for an Administrative Secretary position violated any statute, policy, rule, or written agreement.
<u>SUMMARY:</u>	<p>Grievant is employed by Respondent DHHR in the Division of Family Assistance ("DFA"). Grievant has been serving as a Secretary II under the direct supervision of the DFA Director since her position was reallocated in 2002. In or around June of 2011, Grievant's supervisor, as requested by the Deputy Commissioner of Finance in the Bureau initiated an effort to post a vacant Office Assistant II ("OA II") position to be filled as an Administrative Secretary. For various reasons, not fully developed in the record, this initiative had not obtained the necessary approval from the Governor's Office, Respondent DOP, or higher management within Respondent DHHR as of January 2012, when Grievant filed this grievance. While the grievance was pending on February 16, 2012, the Bureau's Deputy Commissioner of Programs, withdrew the posting request.</p> <p>Grievant failed to demonstrate how the actions of her employer or DOP in regard to any failure to follow through by posting an Administrative Secretary position violated any applicable law, rule, policy or agreement, or involved an abuse of the agencies' substantial discretion in determining whether and how to fill a particular position in the work force.</p>

KEYWORDS: Internal Equity Pay Increase; Pay Plan Implementation Policy; Puccio Memo; Alsop Memo; Policy Implementation; Classification; Organizational Unit; Highest Paid Comparable Employee; Arbitrary and Capricious

CASE STYLE: Asbury v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel
DOCKET NO. 2011-1551-DHHR (5/17/2013)

PRIMARY ISSUES: Whether Grievant was entitled to an internal equity pay increase.

SUMMARY: Grievant claims that he was entitled to an internal equity salary increase of 10% because he made a request for that increase in May 2011, after the issuance of the Alsop Memo. At that time, the highest paid comparable employee in Grievant's unit was paid 20% more than Grievant. Respondent argues that the procedures for seeking the increase were not in effect until mid-September 2011, and by that time the highest paid comparable employee in Grievant's unit was not making 20% more in salary than Grievant. Therefore, at the time the request for an increase could be submitted, Grievant was no longer eligible for the internal equity pay adjustment. Grievant was unable to prove that Respondent DHHR was required to grant him a discretionary internal equity salary increase even. Respondent DHHR was not required to submit the request prior to completion of its guidelines and procedures. When those procedures were completed, Grievant was not eligible for the discretionary increase.
DENIED

KEYWORDS: Standards of Work Performance and Conduct; DOP Workplace Harassment; Physically Aggressive Behavior; Bodily Harm; Kicked Supervisor

CASE STYLE: Simons v. Division of Highways
DOCKET NO. 2013-0743-DOT (5/22/2013)

PRIMARY ISSUES: Whether Grievant kicked and injured her immediate supervisor as alleged, and whether the penalty imposed was appropriate.

SUMMARY: Grievant was suspended from for 3 days based upon the allegation that she kicked her immediate supervisor in response to an inappropriate comment he directed at her. Grievant provided multiple and somewhat inconsistent defenses to this charge, including: (1) that the kick was an involuntary act resulting from chronic muscle spasms; (2) that she barely touched her supervisor's leg with her foot, and the severe bruise and swelling he later displayed could not have resulted from her actions; and (3) during the Level Three hearing, that she only made contact with the leg of the chair on which he was sitting. Ultimately, Respondent's witnesses were more credible than Grievant, and Respondent proved the charge by a preponderance of the evidence. Kicking a co-worker or supervisor is a serious offense for which a three-day suspension was not an excessive penalty.

KEYWORDS: Absenteeism; Extended Breaks; Hours Worked; Failure to Report Proper and Accurate Attendance; Progressive Disciplinary

CASE STYLE: Daugherty, et al. v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2012-0803-CONS (5/20/2013)

PRIMARY ISSUES: Whether Respondent meet its burden of proof that the Grievants' suspensions were executed with good cause.

SUMMARY: On January 30, 2012, each Grievant was informed in writing of a five (5) day suspension, with staggering effective and ending dates for February, 2012. Grievants were issued this five-day suspension for misconduct based on not accurately reporting their actual work hours, as a result of information gathered during an investigation conducted by the State of West Virginia Department of Health and Human Resources Office of the Inspector General. The Respondent has met its burden of proof and established that the suspensions were justified.

KEYWORDS: Additional Responsibilities; Temporary Upgrade; Pay Grade; Temporary Classification Upgrades Policy

CASE STYLE: Rise v. Division of Corrections/Pruntytown Correctional Center and Division of Personnel
DOCKET NO. 2012-1464-MAPS (5/20/2013)

PRIMARY ISSUES: Whether Grievant was eligible for a temporary upgrade.

SUMMARY: It is undisputed that Grievant worked as the facility Shift Commander on June 11, 2012. This is a position normally held by a Correctional Officer 5 at Pruntytown Correctional Center. Grievant is classified as a Correction Officer 3. Grievant amended his statement of grievance at level one removing the request for reallocation. Due to the limited amount of time spent performing the duties a temporary upgrade to a higher pay grade was unavailable as relief.

<u>KEYWORDS:</u>	Job Duties; Classification; Reallocation; Discretionary Pay Increase; Internal Equity; Pay Plan Implementation Policy; Position Description Form
<u>CASE STYLE:</u>	<u>Butcher v. Department of Health and Human Resources/Office of Human Resource Management and Division of Personnel</u> DOCKET NO. 2012-0507-DHHR (5/9/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant has shown that her duties have significantly changed, that her duties and responsibilities are a better fit for the position sought, or that DOP's determination to classify her as a Claims Representative 2 was clearly wrong. Whether Grievant has proven that she is entitled to an Internal Equity discretionary pay increase.
<u>SUMMARY:</u>	Grievant asserts that since she became a Claims Representative 2 with the Disability Unit of DHHR in November of 2011, new and substantial duties have been added to the position, which are consistent with the Workers' Compensation Claims Adjuster 3 classification. She asserts that DOP must reallocate her position accordingly, with a pay increase of ten percent. Respondent DOP maintains that Grievant's present classification as Claims Representative 2 is the "best fit" and encompasses her present duties. Grievant failed to prove that her position should be reallocated as asserted, because the nature and characteristics of her work most closely resemble those described by the Claims Representative 2 classification. Grievant did not demonstrate that any of the changes or additions in her duties are such that she should be reallocated to the requested classification or that it was a better "fit" for her position. Grievant further avers that she is entitled to a discretionary pay increase under the Internal Equity provisions of the Pay Plan Implementation Policy of DOP at III.D.3. Grievant cannot be eligible for this increase unless there are "comparable" employees in her organizational unit and job class who earn twenty percent more than she. Grievant is the only employee in her job classification in the Disability Unit and, therefore, there is no one with whom she can be compared. The internal equity pay provision cannot be implemented under these circumstances. In addition, even when all of the criterion of the Internal Equity provisions are met, the salary increase thereunder is entirely discretionary. Respondent is not obligated to grant a discretionary pay increase. DENIED.

<u>KEYWORDS:</u>	Reallocation; Reclassification; Promotion; Classification System; Educational Expense Reimbursement Program; Greater Pay; Discriminatory; Constructively Discharged
<u>CASE STYLE:</u>	<u>Williams v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2012-1148-CONS (5/9/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant can be relieved of her contractual obligation to Respondent, whether Grievant was entitled to greater and earlier compensation for her promotion to Nurse III and whether Grievant was constructively discharged.
<u>SUMMARY:</u>	Grievant filed three grievances consolidated in the instant action. In her grievances, Grievant asserts that Respondent failed to timely promote her, failed to pay her an appropriate salary once promoted, and then constructively discharged her when she was forced to resign. Grievant sought in part to be released from an education reimbursement contract she entered into with Respondent to provide her with monies to attend college and graduate school in return for Grievant's agreement to work for Respondent for a specified time period. The Grievance Board does not have the authority to sever the contract between Grievant and Respondent for educational reimbursement or to determine how the terms of the contract are to be fulfilled. Grievant did not prove she was entitled to greater pay upon her promotion or for her pay to commence earlier than it did. A reasonable person in Grievant's position would not have felt compelled to resign because of her conditions of employment.

KEYWORDS: Verbal Argument; Threatening Behavior; Workplace Conduct; Fighting, Discretion

CASE STYLE: Mooney v. Division of Highways
DOCKET NO. 2013-0149-DOT (5/15/2013)

PRIMARY ISSUES: Whether Respondent established that Grievant's behavior was improper and unacceptable workplace conduct and whether the discipline levied was excessive and/or unreasonable.

SUMMARY: Two adult men participated in a heated verbal altercation at the workplace which stopped short of physical combat between the co-workers. An invitation was extended to take the matter outside; neither co-worker threw a first punch. Grievant's participation in the altercation is not disputed. Grievant's degree of culpability is disputed. Respondent maintains its disciplinary action with regard to Grievant was lawful and reasonable. Applicable West Virginia Division of Personnel Workplace Security Policy provides that threatening or assaultive behavior will not be tolerated and must be resolved by managers/supervisors on a case-by-case basis. An employee engaging in behavior in violation of Workplace Security Policy is subject to disciplinary action, up to and including dismissal. Grievance denied.